

## LEGAL ASPECTS OF SHARIA INVESTMENT AND WORKING CAPITAL FINANCING (A Case Study in Murabaha contract in Micro Capital Service Unit of Daleman Syari'ah of PT. Permodalan Nasional Madani (Persero) Solo Branch)

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### ABSTRACT

This legal research aimed to find empirical evidence of the potential presence of conventional financing elements in the sharia financing model based on the Islamic law perspective. It also aimed to examine whether or not a financing contract for purchasing computer units and renovating a store has complied with the sharia contract model according to Quran and Sunnah. To this end, this research employed a normative approach through literature and field research by referring to the legal norms concerning sharia contract based on Quran and Hadith, Fatwa of National Sharia Board of Indonesian Ulema Council (DSN-MUI), and Bank Indonesia Regulation. This research showed that the use of Murabaha contract for investment and working capital financing to purchase computer units and renovate the store had not complied with the true purpose of the Murabaha principle.

Keywords: Sharia contract, murabaha, financing, investment, working capital.

### INTRODUCTION

Quran, as the guideline of a Muslim, has explicitly regulated business activities and views them as activities. Qur'an recognizes the legitimation of a business<sup>1</sup> and explains the principles and guidelines in business issues among individuals and groups.

Quran recognition of wealth ownership serves as the legal basis for Muslims to make decisions regarding their wealth and business competition based on supply and demand<sup>2</sup>. It should be noted that individuals are required to holistically implement the business ethics determined in Al-Quran in doing all transactions.

The concept of sharia economy emphasizes the implementation of Islamic values as the basis of economic activities in order to bring welfare in worldly life and the afterlife. Establishing Islamic financial institutions is one of the efforts to realize the Islamic economic values in people's daily lives. The banking sector plays a pivotal role and significantly impacts the economic activities of the modern community. This sector also significantly drives and accelerates the economic advancement of a community through its intermediary function in investment development.

In Indonesia, the first sharia banking institution (i.e., Bank Muamalat Indonesia) was born when Law no. 7 of 1992 on Banking was passed. Since then, the dual banking system- sharia and conventional- has been running in the country's banking sector. The development of the sharia banking system becomes more significant when law no. 21 of 2008 on Sharia Banking was passed. The industrial prospect of the sharia banking sector grows as the demands and supplies of sharia banking services in the community rise<sup>3</sup>. From the demand side, a considerable number of communities desire the presence and availability of sharia banking services. Meanwhile, from the supply side, there is a growing interest among investors to enter the sharia banking industry. These sides should be intermediated through a transaction.

Some forms of commonly used sharia contract include<sup>4</sup>:

- a. *Al-Musyarakah.*
- b. *Al-Mudharabah.*
- c. *Al-Murabahah*
- d. *Bai as-Salam*
- e. *Bai as-Istishna*
- f. *Al-Ijarah*

<sup>1</sup> Madinah, *Al Qur'an dan Terjemahannya*, 1990, Surah al-Mulk : 15

الشُّورُ وَاللَّيْلُ رُفُوهُ ۖ مِمَّنْ وَكَلُوا مَتَاكِهَهَا فِي فَاغَشٍ ذَلُولًا الْأَرْضَ لَكُمْ جَعَلَ الَّذِي هُوَ

*It is He who made the earth tame for you – so walk among its slopes and eat of His provision – .... “.*

<sup>2</sup> Merza Gamal, “Sistem Ekonomi Islam,” <<http://www.mail-archive.com>>. Accessed 22 March 2018.

<sup>3</sup> Mulya E. Siregar, “The Global Islamic Finance: Positioning Indonesian Islamic Banking Industry,” (Paper presented in General Lecture in Postgraduate Program of PSTTI Universitas Indonesia, Jakarta, 27 July 2007).

<sup>4</sup> Muhammad Syafi’I Antonio, *Bank Syariah: Dari Teori ke Praktik*, cet. 9, (Jakarta: Gema Insani, 2005).

It is important to note that a transaction is forbidden when it contains three following aspects<sup>5</sup>:

1. Forbidden object *Li Dzatihi*,

A transaction should be free from any forbidden object (goods and services).

2. A transaction is also forbidden when it contains<sup>6</sup> an element of *Tadlis* (fraud), *Maysir* (gambling), *Ikhtibar* (stockpiling), *Najasy* (price manipulation), *Gharar*(uncertainty), and *Riba* (interest); .
3. Failure to comply with the principle and requirement of the contract

Any product offered in the contract should meet Islamic economic principles in order to make a valid contract in sharia banking transactions. A contract financing that complies with sharia law and functions of sharia banking, as stated previously, has long been a part of Islamic traditions since the era of Prophet Muhammad PBUH. In the prophet era, the banking functions were carried out by individuals, and usually, one person was responsible for only one function.

However, as banking transactions become increasingly complex and the presence of sharia banking results in the needs of a design combining several agreements in a financing transaction, there is an urgent need for expertise/ specialization in designing a clause in the contract that complies with Sharia law. This need is further emphasized in the Blueprint of Sharia Banking Development designed by Bank Indonesia (2002), stating that Sharia banking is a new industrial sector that requires special skill and knowledge. Shortage of adequate knowledge and skills is likely to jeopardize the long-term sustainability of sharia banking operations.

In the conventional economic system, the positive law (i.e., the Indonesian Civil Code) serves as the source of law for any contract. Article 1338, in conjunction with Article 1320 of the Indonesian Civil Code, states that All valid agreements apply to the individuals who have concluded them as law. The validity of an agreement is determined based on the requirements stated in article 1320 of the Indonesian Civil Code. Therefore, an agreement is null and void when it fails to meet the requirement stipulated in the Civil Code,

It is undeniable that the state's positive law significantly dominates and influences the sharia banking sector. Its domination and influence can be seen from the format and materials of sharia banking agreements, where

Financing agreements like *musyarakah*, *murabahah*, *ijarah*, and *istishna* could be deemed adopting format and materials of agreement in the positive law. This condition can be seen in the object of this study, where an application for a certain amount of funds for investment and working capital receives a financing facility from PT Permodalan Nasional Madani (Persero). After passing the analysis process and meeting the bank's technical aspects, the request is granted a three-year tenure. For this purpose, Bai' Bitsaman Ajil contract, also known as the *Murabaha* contract, was applied.

In this regard, it is important to highlight that the form and the materials of the contract for investment and working capital purposes should comply with the principle and requirements of the sale contract according to Islamic law. This is fundamental, as the legal consequences emerging from a contract are directly related to the compliance of formats and materials with Islamic law principles and requirements.

## RESEARCH METHODOLOGY

This normative legal research employed a qualitative, empirical approach by referring to the legal norms related to contract/agreement according to Sharia law stipulated in Quran and Hadith, positive law, Fatwa of National Sharia Board, and experts' statements. Experts' views were drawn from the scientific literature on legal issues in the Islamic economy, particularly sharia banking that is relevant with the discussion of financing products in sharia banking and their agreements. The function of the agreements in a contract is to make sure that the contract complies with the sharia principle.

## DISCUSSION

### 1. An analysis of compliance of forms and materials of clauses in the agreement

#### 1.1 The contract format

The financing contract agreed and signed by the two parties was recorded in contract no. 030/PK/ULM-DLMN/MRBH/VI/2013, dated 21 June 2013. The contract used Sale contract (Bai' Bitsaman Ajil), or also known as *Murabaha*. Based on the definition, Bai' Bitsaman Ajil contract refers to an agreement between parties. The first party purchases goods ordered by the Second Party and sells them to the Second party with agreed profit by installment for an agreed period. This contract is also known as a cost-plus contract, where the bank buys goods and sells them to the customer. Considering that the purpose of the financing is for investment and working capital, i.e., to purchase five computer sets and renovate the business store, the application contains several legal actions and legal consequences, and thus, implementation

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<sup>5</sup> Mustafa Edwin Nasution, et al., *Pengenalan Eksklusif Ekonomi Mikro Islam*, (Jakarta: Kencana Perdana Media Group, 2006).

<sup>6</sup> Muhammad Yusuf Qardhawi, *Halal & Haram dalam Islam*, Alih Bahasa oleh Mu'ammal Ha'idy (Surabaya: \_\_ Bina Ilmu Omzet), h. 367.

of a cost-plus financing contract (Bai' Bitsaman Ajil) is deemed unsuitable because the legal actions (i.e., purchasing five computer sets and renovating the store) contains two different natures.

- (1) . In this case, these two different legal actions were considered the same. It turns out that the first party was not capable of providing the object directly using a cost-plus financing scheme as there are several objects that should be purchased in a preorder scheme and took time to finish the order. The nature of this preorder scheme better fits istishna contract (long-term sales contract) instead of bai' bitsaman ajil (cost-plus financing) contract.
- (2) Labor costs for renovation.  
As the contract mentions labor costs, the application of bai' bitsaman ajil was incomplete. In other words, there is a need for another contract related to the financing of labor costs for renovation purposes. In this case, it is impossible to include labor cost into the cost-plus contract because this type of contract is limited to the purchase of an object by the bank and sell it to the customer with an agreed profit.

## 1.2 Analysis of Clauses

This section further analyzes each clause in the contract in order to determine whether or not the involved clauses (articles 1 to 10) comply with the principle and requirements of sharia concept.

The analysis result showed four clauses that contradict the principle and requirement of bai' bitsaman ajil and the concept of sharia contract. They were (1) Article 1 paragraph (2) on the amount of financing, use, and tenure; (2) Article 4 paragraph (2) on the collateral; (3) Article 5 paragraph 7 on repayment and penalties; and (4) article 9 on dispute settlement.

### 1.2.1 Article 1 paragraph (2) on amount of financing, use, and tenure reads as follow:

"The customer should receive a certain amount from PNM for purchasing working capital and investment purposes."

This article is deemed to contradict the principle and requirement of bai' bitsaman ajil contract as it does not state the object to be purchased and how the object is transferred in a clear, detailed manner. Such a clause can result in uncertainty regarding the object or service to be purchased. Therefore, the clause in article 1 paragraph (2) of the contract contains at least the element of gharar (unclarity) regarding the object of the contract.

### 1.2.2 Another clause that does not comply with the sharia principle was article 4 paragraph (2) that reads:

"Any form of addition and/or change in collateral stipulated in paragraph 1 of this article, which has been or to be bound by a separated document should be deemed an inseparable part of this contract (Murabaha)."

This clause does not mention the form of the collateral binding, whether it is in notarial or other forms. This is related to article 5 of the contract, which states that the notarial fee is charged to the customer.

### 1.2.3 Article 5 paragraph 7 on Installment and penalty reads as follow:

"The customer's late payment to PNM should be charged 40.000, - (forty thousand rupiahs) per/month."

This article does not comply with the sharia principle for applying charges for late payment. It does not state the purpose of the charge in a clear manner, resulting in many interpretations and make the contract contains an element of tadhlis (fraud). There is a possibility that the customer thinks that the charge would become the bank's non-operating income. According to fatwa DSN-MUI no. 17/DSN-MUI/IX/2000 on sanctions, it is asserted that the sanctions for sharia bank customers who cannot/ have not been able to make payment should be based on ta'zir principle to encourage them to be more discipline. The sanctions refers to a certain amount of money determined based on the agreement when the contract is made.

### 1.2.4 Another clause that does not comply with the sharia principle is article 9 that reads:

(1) The involving party agrees that failure to settle any dispute related to this contract in an amicable manner should be done through and based on the National Sharia Arbitrary Board (Basyarnas), where the Basyarnas decision is final and binding.

(2) The dispute settlement as mentioned in paragraph 1 does not eliminate PNM's right, based on its own consideration, to settle the dispute through the State Court, Commercial Court, or other process deemed necessary in the territory of the Republic of Indonesia.

This article is unclear because it does not explicitly mention to use which legal domicile when a dispute occurs. This article results in great disadvantages for the customer, as it could be interpreted that the bank can use any legal instrument mentioned above when the dispute occurs. In other words, when banks fail to win a claim in Basyarnas, they can file a claim to the state court, commercial court, or through any other process. The article also does not mention the location of the institutions mentioned.

## CONCLUSION

Based on the analysis result, several conclusions are drawn as follows:

1. The use of Cost-plus financing (Bai' Bitsaman Ajil) for facilitating investment and working capital financing, i.e., purchasing five computer sets and renovation purposes, is not compliant with the Sharia law. This incompliance lies in two aspects: (1) The needs of purchasing computer sets and renovation contain two different legal actions (i.e., purchasing an object and order to build an object) that lead to different legal consequences. Thus, these two aspects should be separated into two different contracts when using bai' bitsaman ajil scheme. (2) The labor cost for the renovation job in the contract was not stated in a clear manner. That is, if the parties want to proceed with the financing

for renovation according to the contract principle, they should make another contract related to renovation financing that contains elements object purchase and labor costs.

2. In addition to the incompliance of the contract format, some clauses within the contract were also deemed incompliant with the sharia principle. They were (1) Article 1 paragraph (2) on the amount of financing, use, and tenure; (2) Article 4 paragraph (2) on the collateral; (3) Article 5 paragraph 7 on repayment and penalties; and (4) article 9 on dispute settlement.

## RECOMMENDATION

Based on the conclusion, the following recommendations are proposed:

1. Any financing contract in sharia banking transaction needs to consider using the notarial agreement instead of an adhesion contract.
2. In this regard, the notary should possess adequate understanding of the making of contracts related to business transactions in sharia banking activities, particularly in financing activities.

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